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No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

SUPPLEMENTAL BRIEF AND APPENDIX

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190
Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796

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SUPPLEMENTAL BRIEF AND APPENDIX

ARGUMENT

I. An arm of Congress declares the salary basis test an "interpretative bulletin" governed by Skidmore analysis.

The decision below hinges on assuming the salary basis test in 29 C.F.R. § 541.118, including the

disciplinary deduction standard, was a legislative "regulation" issued under 29 U.S.C. § 213(a)(1) to which Chevron deference was owed. App. 1, 2, 3, 5, 6, 7 and 8; Petition, pp. 15-17; Reply, pp. 17-21. An arm of Congress now definitively confirms the error of that assumption.

Applying the Fair Labor Standards Act, 29 U.S.C. §§ 207 *et seq.* (the FLSA), to employes of Congress, the Congressional Office of Compliance has declared the salary basis test is **not** a "substantive regulation" entitled to Chevron deference but is instead an "interpretative bulletin" governed by Skidmore analysis. 142 Cong. Rec. S196 (cols.2&3), S222 (cols.1&2) and S224 (col.1) (daily ed. January 22, 1996) (S.App. 144-149).[1] Congress, to sensitize its members to the FLSA as enforced by USDOL, applied the FLSA to all Congressional employes. The Congressional Accountability Act, 2 U.S.C. §§ 1301 *et seq.* (the CAA). The CAA was intended to restrict Congress to "the same legal safe-harbors that [USDOL] has made available to private sector and State and local government employers" (142 Cong. Rec. S223 (col.3) (daily ed. January 22, 1996) (S.App. 147)) and to "require Congress to experience the same compliance burdens faced by other employers so that it could more fairly legislate in this area" (*id.* at S222 (col.1) (S.App. 146)). The Office of Compliance recognized other employers have "few such safe harbors, particularly in the area of exemptions." (*id.* at S223 (col.3) (S.App. 147).

To achieve these purposes, the CAA mandated that the Office of Compliance, in enforcing the CAA, apply the same "substantive regulations" to Congressional employes which USDOL applies to other employers under the FLSA. 2 U.S.C. §§ 1313(c)(2) and 1381(a). Discharging this mandate, the Office of Compliance had "carefully

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[1]The cited commentary applies to Senate employes. It is repeated for other employes. *Id.* at S233 to S236, S245 to S248.

review[ed] the entire corpus of [USDOL's] regulations." 142 Cong. Rec. S224 (col.3) to S 225 (col.1) (daily ed. January 22, 1996) (S.App. 148). The Office of Compliance then adopted its own regulations. *Id.* at S196 *et seq.*

The Office of Compliance concluded that the contents of "Subpart B of Part 541", i.e., 29 C.F.R. Part 541, Subpart B which includes the salary basis test and disciplinary deduction standard, "are **not** substantive regulations within the meaning of [the FLSA]" but are instead "interpretive bulletins" governed by Skidmore analysis. 142 Cong. Rec. S222 (col.1&2) (daily ed. January 22, 1996) (S.App. 146-147), emphasis added. As partial support for concluding Skidmore analysis applies, the Office noted a recent Seventh Circuit decision which properly held USDOL's "interpretive bulletins" under the FLSA are only "'give[n] . . . the respect their reasoning earns them.'" 142 Cong. Rec. S222 (col.2) (daily ed. January 22, 1996) (S.App. 147), quoting Reich v. Interstate Brands Corp., 57 F.3d 574, 577 (7th Cir. 1995).

The Office of Compliance then focused on USDOL's creation of a salary requirement as an exemption criterion. Unlike other federal employes, whose exempt status has never been governed by any salary requirement (Petition, p. 10; Reply, p. 14; App. 52-55, 76-82), the CAA, by imposing USDOL's substantive regulations on Congressional employment, mandated that the salary requirement in 29 C.F.R. §§ 541.1, 541.2 and 541.3 be adopted for Congressional employes. 142 Cong. Rec. S223 (col.3) to S224 (col. 1) and S227 (col.3) to S228 (col.3) (daily ed. January 22, 1996).

The effect of that general salary requirement on Congress will, however, likely be far different than its effect on State and local governments. The Office of Compliance also adopted 29 C.F.R. § 541.5d as a "substantive regulation" which recognizes that public accountability principles limit the application of the FLSA

to public sector employes such as Congressional employes. 142 Cong. Rec. S224 (col.1) (daily ed. January 22, 1996) (S.App. 148). By contrast, it found the salary basis test, 29 C.F.R. § 541.118, was only "an interpretative bulletin" which it need not address. *Id.* To avoid even implying it agreed with the salary basis test, the Office of Compliance expressly altered its version of 29 C.F.R. § 541.5d to exclude any reference to 29 C.F.R. § 541.118. 142 Cong. Rec. S224 (col.1) (daily ed. January 22, 1996) (S.App. 148). In interpreting the meaning of being paid "on a salary basis" under the substantive exemption regulations, 29 C.F.R. §§ 541.1, 541.2 and 541.3, as they apply to Congressional employes, the Office of Compliance will apparently exercise its independent judgment. *Id.*

Congressional employes, like other federal employes, are subject to ranges of discipline far wider than the narrow confines of the disciplinary deduction standard in 29 C.F.R. § 541.118(5). *E.g.,* 2 U.S.C. § 60-1(a)(2) (S.App. 144). Congress has long intended its own supervisory officers to have broad and open-ended disciplinary authority (*e.g.,* Witty v. Jones, 563 F.Supp. 415, 417 (D.D.C. 1983)) because "operations under the supervision of those officers are to be carried out with reasonable efficiency" (1970 U.S.Cong. & Admin. News, Vol. 3, p. 4445). Its committee rules routinely authorize "suspension" of employes as discipline. *E.g.,* 141 Cong. Rec. S2895 (col.3) (daily ed. February 16, 1995); 139 Cong. Rec. S1649 (col.1) (daily ed. February 16, 1993); 139 Cong. Rec. S638 (col.2) (daily ed. January 22, 1993); 138 Cong. Rec. S10945 (col.1) (daily ed. July 30, 1992). If the disciplinary deduction standard applied, no Congressional employe would be exempt.

Despite the intent of Congress to apply the FLSA to Congressional employing agencies in the same way it applies to State, local and private employers -- "[u]nder the CAA, they are legally entitled to no more" (142 Cong. Rec. S223 (col.3) (daily ed. January 22, 1996) (S.App.

147)) -- the decision below, if it stands, would create substantial disparities. The Office of Compliance has concluded Congress plainly intended Congressional employers to take advantage of those exemptions. 142 Cong. Rec. S224 (col.3) to S225 (col.1) and S227 (col.3) to S228 (col.3) (daily ed. January 22, 1996). The Office of Compliance must both examine all federal laws on "disciplinary procedures" and other personnel issues (2 U.S.C. § 1302(b)(1)) and "require Congress to experience the same compliance burdens faced by other employers" (142 Cong. Rec. S222 (col.1) (S.App. 146) (daily ed. January 22, 1996)). It will likely reject part of a mere interpretative bulletin which, in the face of laws and Committee rules allowing open-ended discipline of all Congressional employes, would preclude all exemptions under the FLSA. The decision below, by deferring to the disciplinary deduction standard as if it were a regulation expressing legislative intent would, unless corrected, impose on States far heavier and differing FLSA burdens than those Congress now imposes on itself and would impose burdens Congress never intended to create.

With the FLSA extension to Congressional employes having taken effect on January 23, 1996, the Senate and House enacted resolutions unanimously approving the Office of Compliance FLSA regulations on an interim basis. 142 Cong. Rec. S225 (col.3), S284 (col.3) to S285 (col.1) and D22 (daily ed. January 22, 1996). Approval on a final basis is now before Senate and House committees. 142 Cong. Rec. D128 (daily ed. February 29, 1996); 142 Cong. Rec. D139 (daily ed. March 5, 1996); 142 Cong. Rec. D148 (daily ed. March 6, 1996). Final approval is expected by April 15, 1996. 142 Cong. Rec. S225 (col.1) (daily ed. January 22, 1996) (S.App. 149). Through these regulations, an arm of Congress confirms -- and Congress itself may soon confirm -- that the salary basis test, with its disciplinary deduction standard, is merely an interpretative bulletin governed by Skidmore analysis.

II. USDOL now informs courts that the decision below by the Seventh Circuit and the Service Employees decision by the Ninth Circuit are in "direct conflict".

USDOL, opposing the petition here, argued that "there is no direct conflict warranting this Court's review" between the decision below by the Seventh Circuit Court of Appeals and the decision in Service Employees International Union, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 774 (1996). USDOL brief, p. 24. Perhaps in recognition that courts are reading Service Employes and Mueller as being in direct conflict (*e.g.*, Auer v. Robbins, 65 F.3d 702, 710, n. 6 (8th Cir. 1995), *cert. pending*, No. 95-897 (filed Dec. 7, 1995)), USDOL now informs other courts that the circuit courts are in "direct conflict".

USDOL is arguing to the Sixth Circuit Court of Appeals, in a case examining whether the disciplinary deduction standard applies to State employers, that a "direct conflict" exists between Service Employees holding the salary basis test was entirely invalid prior to September 1991 and Mueller holding "the disciplinary part of the Secretary's 'salary basis' test is valid." USDOL *amicus* brief, pp. 16, 24-25, in Jackson v. Commonwealth of Kentucky, Nos. 95-6283 and 95-6284 (filed March 5, 1996), on appeal from 892 F.Supp. 923 (E.D.Ky. 1995) (S.App. 150-151).

Noting the Jackson district court adopted the Service Employees holding that "the entire 'salary basis' test as applied to the public sector prior to 1991" was invalid, USDOL argued this was "inconsistent with [the Jackson district court's] holding" that the test after 1991 "is valid in its entirety, **since the disciplinary portion of the test was not changed in 1991**." (USDOL Jackson brief, p. 24 (S.App. 150-151), emphasis added.)

USDOL then argued that "[t]his conclusion" by the Jackson district court reiterating the holding in Service Employees "is also in **direct** conflict with the Seventh Circuit's holding in Mueller v. Reich, [citation omitted], where the court stated that the disciplinary part of the Secretary's "salary basis" test is valid." USDOL Jackson brief, pp. 24-25 (S.App. 151), emphasis added.

This Court will determine the nature of any actual conflict in the circuits. USDOL now informs other courts that a direct conflict does exist -- which USDOL would aggravate through advocacy rather than eliminate through meaningful rulemaking. At a minimum, an indirect conflict exists (Petition, pp. 10-11 and n. 2) which, given the vital Constitutional interests involved, should be resolved by this Court.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796

UNITED STATES STATUTES

2 U.S.C. § 60-1 states, in relevant part:

> § 60-1. Authority of officers of the Congress over Congressional employees
>
> **(a) . . . discipline**
>
> Each officer of the Congress having responsibility for the supervision of employees, . . . shall have authority--
>
> . . .
>
> (2) to remove or otherwise discipline any employee under his supervision.

REGULATORY ACTIONS BY OFFICE OF COMPLIANCE, U.S. CONGRESS

142 Cong. Rec. S196, S221, S222, S224, S225 (daily ed. January 22, 1996) states in relevant part:

> [S196 (col.2)]
> NOTICE OF ADOPTION OF PROCEDURAL RULES
>
> Mr. THURMOND. Mr. President, pursuant to the Congressional Accountability Act of 1995 [3 U.S.C. §§ 1301 *et seq.*], a Notice of Adoption of Regulations and Submission for Approval and Issuance of Interim Regulations, together with a copy of the adopted regulations, was submitted by the Office of Compliance, U.S. Congress. These final rules implement the rights and protections of the following statutes made applicable by the Congressional Accountability Act: . . . Fair Labor Standards Act, ...
>
> . . .
>
> The notice announces the adoption of the final regulation as an interim regulation

on the same matters. Additionally, these notices include the Board's recommendations as to the method of House and Senate approval of the final regulations.

[Notice and regulations published by unanimous consent.]

. . . [S221 (col.2]

SENATE

FAIR LABOR STANDARDS ACT, FINAL AND INTERIM REGULATIONS RELATING TO THE SENATE AND ITS EMPLOYING OFFICES

OFFICE OF COMPLIANCE--THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995: EXTENSION OF RIGHTS AND PROTECTIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938.

NOTICE OF ADOPTION OF REGULATIONS AND SUBMISSION FOR APPROVAL AND ISSUANCE OF INTERIM REGULATIONS

. . . The interim regulations shall expire on April 15, 1996 or on the dates on which the appropriate resolutions concerning the Board's final regulations are passed by the House and Senate, respectively, whichever is earlier.

. . . [S221 (col. 3)]

II. Consideration of public comments; the Board's response and modifications to the NPR's rules

A. Requests that the Board provide additional guidance, including interpretative bulletins and opinion letters.

. . . [S222 (col. 1)]

At the outset, the Board must decline the suggestion that it modify the Secretary's regulations in order to remove the ambiguities and resulting uncertainties that Congressional offices will face in complying with the CAA once it takes effect. . . . As is true of many regulatory issues, ambiguity and uncertainty are part of the FLSA regulatory regime that is presently imposed --with much criticism and protest--on private sector and state and local government employers.

The example of the executive, administrative and professional employee exemptions illustrates this point. The Board specifically highlighted this problem and asked for comment in its ANPR (141 Cong. Rec. S14542, S14543) on September 28, 1995. Although the Board received many comments on the issue and is sympathetic with the concerns of employing offices confronting such ambiguity and uncertainty, the Board has neither been given nor can find appropriate justification for relieving employing offices of the compliance burdens that all employers face under the FLSA. The CAA was intended not only to bring covered employees the benefits of the FLSA and other incorporated laws, but also to require Congress to experience the same compliance burdens faced by other employers so that it could more fairly legislate in this area. The Board cannot agree with suggestions that would rob the CAA of one of its principal intended effects.

The Board must also decline the suggestion that it adopt, as either formal regulations or as its own interpretative

authority, the interpretive bulletins found in Subpart B of Part 541 [29 C.F.R. Part 541, Subpart B] . . . . Section 203(c)(2) of the CAA requires the Board to promulgate regulations that are the same as the substantive regulations promulgated by the Secretary [of Labor]. . . . [T]he interpretative bulletins set forth in Subpart B of Part 541 . . . are not substantive regulations within the meaning of [the FLSA]. . . .

. . . [S222 (col. 2)]

. . . [L]ike the Administrator [of the Wage and Hour Division] and the courts, the Board intends to depart from the interpretative bulletins only where their persuasive force is lacking or the law otherwise requires (just as courts or the Administrator would do). *See Skidmore v. Swift & Co.*, 323 U.S. 134, 137-38 (1944); *Reich v. Interstate Brands Corp.*, 57 F.3d 574, 577 (7th Cir. 1995) ("[W]e give the Secretary's bulletins the respect their reasoning earns them."); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990)("the persuasive authority of a given interpretation obtains only so long as [']all those factors which give it power to persuade['] persist.") quoting *Skidmore*).

. . . [S223 (col.3)]

. . . The FLSA as currently applied to private employers contains few . . . safe-harbors, particularly in the area of exemptions. . . . And [Congressional] employing offices have the benefit of the same legal safe-harbors that the Secretary of Labor has made available to private sector and State and local government employers. Under the CAA, they are legally entitled to no more.

. . .

B. Specific comments and Board action.

. . . [S224 (col.1)]

2. §541.5d--Special rule for "white collar" employees of a public agency

[The Board is adopting 29 C.F.R. §§ 541.1, 541.2 and 541.3 since] they are substantive regulations. . . .

. . . [29 C.F.R. § 541.5d is a substantive regulation the Board initially proposed not to adopt but is now adopting for reasons articulated by a commentator].

The Board finds merit in the commentator's argument. Moreover, the adoption of this regulation is well in keeping with the Board's mandate to promulgate rules that are "the same as substantive regulations promulgated by the Department of Labor to implement" those FLSA statutory provisions made applicable by the CAA. Accordingly, § 541.5d will be adopted with a minor change that substitutes for the citation to § 541.118 (an interpretative bulletin) the phrase "being paid on a salary basis," which is derived directly from the substantive regulations defining the "white collar" exemptions (i.e., 29 C.F.R. §§ 541.1, .2, .3).

. . .

5. Board determination on regulations "required" to be issued in connection with § 411 default provision

. . . [S225 (col.1)]

The Board has carefully reviewed the entire corpus of the Secretary's regulations . . . [and] has acted based on this review and consideration and in order to prevent wasteful litigation about whether the omission of a regulation from the

Secretary in the Board's regulations was intended or not.

. . .

III. Adoption of Proposed Rules as Final Regulations under Section 304(b)(3) and as Interim Regulations

Having considered the public comments to the proposed rules, the Board pursuant to section 304(b)(3)&(4) of the CAA is adopting these final regulations and transmitting them to the House and Senate with recommendations as to the method of approval by each body under section 304(c). . . . For the reasons explained below, the Board is also today adopting and issuing these rules as interim regulations that will be effective as of January 23, 1996 or the time upon which appropriate resolutions of approval of these interim regulations are passed by the House and/or the Senate, whichever is later. These interim regulations will remain in effect until the earlier of April 15, 1996 or the dates upon which the House and Senate complete their respective consideration of the final regulations that the Board is herein adopting.

. . . [S225 (col.3)]

The House has . . . already signalled its approval of [these] interim regulations both for itself and for the instrumentalities. On December 19, 1995, the House adopted H. Res. 311 and H. Con. Res. 123, which approve "on a provisional basis" regulations "issued by the Office of Compliance before January 23, 1996." . . . .

BRIEF FILED BY USDOL ON MARCH 5, 1996

USDOL *amicus* brief, pp. 16, 24 and 25, in Jackson v. Commonwealth of Kentucky, Nos. 95-6283 and 95-6284 (filed March 5, 1996), on appeal from 892 F.Supp. 923 (E.D.Ky. 1995), states, in relevant part:

> In the [district] court's view [in Jackson], since one part of the 'salary basis' test was infirm, the whole test was fatally flawed before 1991. In so concluding, the district court found "particularly persuasive" the reasoning of the Ninth Circuit in SEIU, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1995) (with supplemental opinion), *cert. denied*, 64 U.S.L.W. 3484 (U.S. Jan. 16, 1996) (No. 95-724). Jackson, 892 F.Supp. at 929. The district court erred by relying on SEIU in invalidating the Secretary's "salary basis" test prior to 1991.
>
> * * *
>
> Finally, and even more unjustifiably, the district court accepted without explanation SEIU's invalidation of the entire "salary basis" test as applied to the public sector prior to 1991 based upon the limited modification of the test dealing with partial-day deductions. See Jackson, 892 F.Supp. at 929. There is absoluteely no support for this ruling. The "salary basis" test is not indivisible, and the invalidity of one part of the test does not mean that the whole test must fail. Cf. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985) ("Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid."). The court in SEIU

did not even focus on the disciplinary portion of the test, but instead spoke only to the partial-day deduction part of the regulation. The district court's conclusion that the whole test was invalid prior to 1991 is also inconsistent with its holding that the Secretary's "salary basis" regulation post-1991 is valid in its entirety, since the disciplinary portion of the test was not changed in 1991. This conclusion is also in direct conflict with the Seventh Circuit's hilding in Mueller v. Reich, 54 F.3d 438, 441-443 (7th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3297 (U.S. Oct. 10, 1995) (No. 95-586), where the court stated that the disciplinary part of the Secretary's "salary basis" test is valid. (For a more detailed discussion of this part of the test, see infra.) In sum, DOL's "salary basis" test as applied to the public sector was valid in its entirety prior to the 1991 regulatory change and the district court's decision holding otherwise should be reversed.